

GRAHAM LEGAL

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BUILDER'S RIGHT TO COMPLETE WORKS AFTER CONTRACT TERMINATION

Stellar Constructions Pty Ltd v Ferguson (Domestic Building) [2013] VCAT 2159 was a building case determined by Member Farrelly by Orders made on 20 December 2013.

At paragraphs 35 and 36 of his reasons for decision Member Farrelly found that the builder had wrongfully asserted that it was entitled to payment of its final claim before the contract works had been completed and, by so doing, had committed a substantial breach of the contract.

In response, the owners accepted the builder's repudiation and the contract thereby came to an end.

Much of the evidence in this pro-

ceeding related to the work still to be performed before the home was truly complete.

The evidence also involved questions as to the reasonable cost of completion (with that cost ultimately being deducted from the money otherwise due to the builder as the final payment).

On behalf of the owners it was argued that the proper method for costing this deduction was the cost the owners would incur in the employment of a second alternate builder.

On behalf of the builder it was said that the builder should be given an opportunity to complete the outstand-



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Builder's Rights to Complete After Building Contract Termination

ing works itself.

A builder is able to derive significant savings if given an opportunity to rectify its own defective works and complete any outstanding works.

Where a builder has to make allowance for the cost of a second builder undertaking those works, the cost differential can be a significant burden.

At paragraph 72 of his decision Member Farrelly reasoned:

In the circumstance where the owners have accepted the builder's repudiation and brought the contract to an end, the builder has no contractual entitlement to return and carry out necessary rectification/completion works.

Having regard also to the animosity plainly evident between (the parties), I do not think it reasonable to require the owners to accept the builder's return to carry out rectification works.

In my view, the owners are entitled to set off against the unpaid contractual balance the reasonable cost they will incur in engaging in independent builder to carry out necessary rectification works.

There are four important lessons here.

1. Notwithstanding that the building contract may have been brought to an end by the wrongful conduct of the builder, the Tribunal retains a discretionary power to give the builder an opportunity to return to the build-

ing site to rectify his defects and complete outstanding works and in spite of an owner's objection to the builder doing so.

2. However, where there has been a history of animosity between the parties, the Tribunal may well exercise its discretion not to require the owners to accept the builder's return.
3. An owner who opposes a builder returning to the site should therefore maintain a thorough diary and record of all verbal and written communications with his or her builder (particularly if there has been a history of animosity).
4. From a builder's perspective, this is another good reason for avoiding acrimonious communications with one's client.



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The **Graham Legal** team is devoted to the task of providing an ever improving standard of care and service.

We use sophisticated computer software.

SimplyLaw is a document production and file management system designed by Phillip Graham. It is extraordinarily powerful.

SimplyLaw incorporates more than 1900 precedents that have been meticulously drafted, formatted and encoded.

Phillip Graham also uses the latest voice recognition technology, **Dragon NaturallySpeaking**.

GL will only be accepting work in areas of law in which we have established and recognised expertise.

Our company policy is to work on all client files as a team.

We delegate individual tasks to the person who will best get the client's work done having regard to the nature of the task to be performed, the skills of our respective team



Latest News

- ◇ On 14 January 2014 Rose Maina celebrated the first anniversary of her debut at **GL**.
- ◇ On 1 February 2014 **GL** celebrated its 24th anniversary at 1059 Mt Alexander Road, Essendon.
- ◇ On 1 March 2014 Phillip Graham will celebrate 38 Years since his admission to practice as a lawyer.
- ◇ On 7 March 2014 it will be 10,000 hours since Rose Maina began at **GL**.
- ◇ On 1 April 2014 Phillip Graham will celebrate 38 years since first being admitted to partnership in law.
- ◇ On 2 May 2014 Val Jakovac will celebrate 6,000 days at **GL**.

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